SUPREME COURT, U.S.
FILED
MAY 11 2010
OFFICE OF THE CLERK

No. 09-723

IN THE

Supreme Court of the United States

AURELIUS CAPITAL PARTNERS, LP, ET AL.,
Petitioners,

v.

THE REPUBLIC OF ARGENTINA,
ARAUCA BIT AFJP S.A., ET AL.,
ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS NML CAPITAL, LTD. AND EM LTD. IN SUPPORT OF THE PETITION

ROBERT A. COHEN
DENNIS H. HRANITZKY
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036

DAVID W. RIVKIN
SUZANNE M. GROSSO
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
JASON J. MENDRO
DANIEL H. AHN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents NML Capital, Ltd. and EM Ltd.

QUESTION PRESENTED

Respondents NML Capital, Ltd. and EM Ltd. support and incorporate the first question presented in the petition for a writ of certiorari filed by Petitioners.

PARTIES TO THE PROCEEDING

Respondents NML Capital, Ltd. and EM Ltd. adopt the statement of the parties to the proceeding in the petition.

Pursuant to this Court's Rule 29.6, undersigned counsel state that neither NML Capital, Ltd. nor EM Ltd. is publicly traded, that neither has a corporate parent, and that no publicly held corporation owns 10% or more of the stock of either.

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 4

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Banco Nacional de Cuba v. Sabbatino,
376 U.S. 398 (1964).....7

Banco Nacional de México v. Société Générale,
820 N.Y.S.2d 588 (N.Y. App. Div. 2006).....8

EM Ltd. v. Republic of Argentina,
473 F.3d 463 (2d Cir. 2007).....9

Gen. Elec. Capital Corp. v. Cent. Bank,
49 F.3d 280 (7th Cir. 1995).....8

Gulf States Utils. Co. v. Fed. Power Comm'n,
411 U.S. 747 (1973).....7

Republic of Argentina v. Weltover, Inc.,
504 U.S. 607 (1992).....4, 5, 6–7

Verlinden B.V. v. Cent. Bank of Nigeria,
461 U.S. 480 (1983).....7

STATUTES

28 U.S.C. § 1610(a).....3

28 U.S.C. § 1610(d).....3

28 U.S.C. §§ 1602–11 3

OTHER AUTHORITIES

Black's Law Dictionary (6th ed. 1990).....5

Ernest J. Oliveri, Latin American Debt and the
Politics of International Finance (1992).....9

H.R. Rep. No. 94-1487 (1976).....5

John Browne, *Close to the Edge*, Pittsburgh Trib. Rev., Dec. 6, 2009 8

Michael Casey, *Sovereign Debt Is the Next Big Worry*, Wall St. J., Dec. 9, 2009 8

S. Rep. No. 94-1310 (1976) 5

Sovereign Debt Defaults Likely Over Next Several Years, Int'l Bus. Times, Dec. 13, 2009 8

Tom McNamara, *Foreign Sovereign Immunity During the New Nationalisation Wave*, 11 Bus. L. Int'l 5 (2010) 8

BRIEF IN SUPPORT OF THE PETITION

Respondents NML Capital, Ltd. ("NML") and EM Ltd. ("EM") respectfully submit this brief in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit. NML and EM adopt the petition's statements of the Opinion Below, Jurisdiction, and Relevant Statutory Provisions. NML and EM further adopt the petition's Statement of the Case, except as clarified below. If the Court grants the petition, NML and EM will argue that the Second Circuit's judgment should be reversed. If the Court subsequently grants the relief requested by Petitioners, the Court should also reverse the Second Circuit's decision with respect to NML and EM.

STATEMENT OF THE CASE

This case arises from the largest sovereign debt default in history. Its resolution will determine whether legislation that Argentina implemented in December 2008 enabled it to expropriate "in kind" assets that were being used for a commercial activity in the United States and, whether that legislation, nonetheless, insulates those assets from attachment and execution by Argentina's U.S. judgment creditors.

NML and EM are creditors of Argentina as holders of bonds issued by Argentina in the United States and repudiated as obligations of Argentina in December 2001. NML and EM have pursued their remedies in the courts of this Nation, as the bond documents issued by Argentina contemplated. Since that time, Argentina has refused to honor the judgments entered against it. Petitioners are other owners of defaulted Argentine bonds.

At issue in this appeal are pre-judgment attachment orders and other forms of process in aid of judgment-enforcement obtained by numerous bondholders, including NML, EM, and Petitioners—all of which were directed to slightly over $200 million in funds in the United States. The *Administración Nacional de Seguridad Social* (the "Administration"), a political subdivision of the Republic of Argentina, acquired legal title to the funds on December 9, 2008, when Argentina nationalized pension funds that had been held by private corporations in the United States, and that had been used by those private corporations solely for the commercial activity of investment.

Petitioners served restraining orders before the Administration took title to the funds, but they did not levy on the funds by service of attachment orders or writs of execution until March 4, 2009 (Pet. 10). By contrast, NML served a restraining order *and* an attachment order before Argentina nationalized the funds.[1] These actions were necessary to prevent Argentina from transferring the funds out of the country and beyond the reach of aggrieved bondholders. Argentina had already removed billions of dollars worth of other assets from the United States in anticipation of and following its default on tens of billions of dollars of external debt.

---

[1] Delivery of an attachment order to the Marshal results in a levy on the property described in that order. Petitioners' assertion that NML neither obtained an attachment order nor levied on the subject property (Pet. 11, 19 n.8) is incorrect. *See* Pet. App. 8a (observing that NML obtained "attachments"). EM obtained no attachment orders, despite the petition's suggestion to the contrary (Pet. 11).

The district court correctly held that the funds were not subject to immunity from attachment or execution under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602–11. A court may attach or execute on a foreign state's property if the foreign state has "waived its immunity" and the property is "used for a commercial activity in the United States." *Id.* § 1610(a) (post-judgment); *id.* § 1610(d) (pre-judgment). There is no dispute that Argentina waived its immunity in the contractual documents governing the bonds in an effort to make the bonds more attractive to investors. The district court found that Argentina's Administration is a subdivision of Argentina for purposes of the FSIA (a determination left undisturbed by the decision of the court of appeals). At the time Argentina took title to the disputed funds through its Administration, those funds were used in the United States for the commercial activity of investing—and for no other activity.

The Second Circuit reversed. The panel reasoned that Argentina (and its Administration) did not have "the opportunity to use the funds for any commercial activity" before the attachment and restraining orders became effective. Pet. App. 20a. Argentina's nationalization law, however, shows the contrary. By the express terms of the law, Argentina took title to the nationalized assets "as a matter of law, in the same kind as that in which they are invested." Pet. App. 90a (Decree 2104/2008, Art. 3, Dec. 9, 2008); *see also* Pet. App. 89a (Law 26,425, Art. 7, Dec. 9, 2008) (providing that the assets are to be "transferred in kind" to the Administration). Thus, when Argentina expropriated the assets, their commercial character did not change; they remained in the same U.S. investment accounts and were

committed to the same commercial use—investment for profit—as they had been previously. The only change was that Argentina itself (through its Administration) assumed the use of the assets for the commercial activity of investment in the United States.

On December 21, 2009, Petitioners sought this Court's review of the Second Circuit's decision. NML and EM support the petition. As Petitioners correctly explain (Pet. 16–24), when a foreign state expropriates property "in kind," and that property is being used for a commercial activity in the United States, the foreign state itself uses that property for a commercial activity in the United States at the time of expropriation. Although the petition admittedly raises a question of first impression about the effects of the language of a particular foreign law, the petition should nonetheless be granted because of Argentina's long history of default and the importance of the case nationally and internationally.

REASONS FOR GRANTING THE PETITION

1. NML and EM agree with Petitioners that a foreign state's ownership of investment accounts in the United States constitutes "use" of the property for a "commercial activity in the United States." This Court's holding in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), permits of no other conclusion. "[W]hen a foreign government acts, not as regulator of a market, but in the manner of a private player within it," the foreign state's actions are "commercial" within the meaning of the FSIA. *Id.* at 614. If the foreign government's activities are "the *type* of actions by which a private party engages in 'trade and traffic or commerce'"—"whatever the motive behind them"—those activities are regarded as

commercial under the FSIA. *Id.* (quoting Black's Law Dictionary 270 (6th ed. 1990)).

The disputed property was used for a commercial activity in the United States under the rule of *Weltover*. So long as it has been located in the United States, that property has been "used for" one and only one activity—investing for profit. The roughly $200 million at issue here were brought from Argentina to the United States to take advantage of the enhanced market security and investment opportunities this country has to offer and have been held in investment accounts and used to trade in Treasury securities, stocks, bonds, American Depositary Receipts, and other investment vehicles with results not achievable in Argentina. Investing for profit is a paradigmatic commercial activity. The Congress that enacted the FSIA explained, "if an activity is customarily carried on for profit, its commercial nature could readily be assumed," and provided specifically that "a foreign government's . . . *investment in a security* of an American corporation" is a "commercial activity." H.R. Rep. No. 94-1487, at 16 (1976) (emphasis added); *see also* S. Rep. No. 94-1310, at 15–16 (1976) (same). The fact that these funds were used to seek profits in *exactly* the same manner as they would be used by a private investor—the quintessential "private player within [a market]"—leaves no doubt that these funds were used for a commercial activity. *See Weltover*, 504 U.S. at 614.

2. As Petitioners correctly explain, Argentina took title to the disputed property "as a matter of law, in the same kind as that in which they are invested." Pet. App. 90a. Thus, the nationalization law was designed to ensure that, at the time of transfer, Argentina would expropriate the property in the

same form in which it was previously held by the private companies. The use of the property did not change: the property was used for the commercial activity of investment in the United States before and *after* Argentina acquired it.[2]

As Petitioners note (Pet. 7, 15), Argentina could have designed the nationalization law to ensure that the assets would cease to be used for a commercial activity when Argentina acquired them. But in this case, it did not. The applicable nationalization law provided for Argentina to take title to property that was (and remains) in use for a commercial activity "in kind" without altering its commercial character. Pet. App. 89a. As a result, Argentina used and is using the nationalized property—just as a "private player" within the market—by continuing to invest it in New York investment accounts. *See Weltover*, 504

---

[2] Argentina argued below that the process served or delivered before the nationalization law took effect is invalid because it was served and delivered when private third-parties who are not subject to any judgments relevant to this matter owned the disputed property. Any controversy over the validity of such pre-nationalization process, however, should not deter the Court from resolving this case. That is because NML also served attachment orders and a restraining order *after* the nationalization law took effect, and EM similarly served a post-nationalization restraining order. Moreover, NML and EM delivered writs of execution after the nationalization law took effect. Therefore, Argentina held title to the disputed property (and continued to invest that property) at the time of the service and delivery of at least some orders and writs that could be affected by the Second Circuit's reasoning, even though they are not subject to its judgment because the Second Circuit's decision addressed only process served and delivered before the nationalization took effect.

U.S. at 614. As such, the property is subject to attachment and execution by the bondholders Argentina bilked.

3. Although this case raises a question of first impression about the effects of the language of a particular foreign law (Pet. iii), it is nonetheless deserving of review. This Court has reviewed decisions that "raised issues of potential and recurring importance," even in the absence of a circuit conflict. *See Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 755 (1973). Review is especially warranted in cases that "raise sensitive issues concerning the foreign relations of the United States." *Verlinden B.V. v...Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983). Indeed, the Court has previously granted certiorari in a case specifically "because the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964).

This is such a case. The Second Circuit's opinion holds that foreign states that waive their immunity to raise capital in the United States can expropriate assets used for a commercial activity in the United States and insulate those assets from attachment or execution by investors they aggrieved here. That holding profoundly affects the relationship between investors in the United States and foreign governments, as well as the role of the U.S. judicial system in refereeing that relationship.

The importance of rejecting the policy established by the Second Circuit's opinion, as required by the FSIA in this context, has never been greater than it is now. The issuance of sovereign debt in the

United States is on the rise. "Despite a staggering 50 percent rise in world sovereign debt in the past two years," forecasters believe there will be a "further increase of 50 percent within four years . . . ." John Browne, *Close to the Edge*, Pittsburgh Trib. Rev., Dec. 6, 2009. At the same time, concerns about the risk of sovereign debt are mounting. *See* Michael Casey, *Sovereign Debt Is the Next Big Worry*, Wall St. J., Dec. 9, 2009. A former chief economist with the International Monetary Fund predicts that "more sovereign debt defaults will be likely over the next several years . . . ." *Sovereign Debt Defaults Likely Over Next Several Years*, Int'l Bus. Times, Dec. 13, 2009. And as a result of the global financial crisis, nationalization schemes, such as Argentina's, have also "greatly increased." Tom McNamara, *Foreign Sovereign Immunity During the New Nationalisation Wave*, 11 Bus. L. Int'l 5, 31 (2010). These trends, taken together, suggest that FSIA litigation is bound to "greatly increase[]" as well. *See id.*

Review is also warranted at this time because it is unlikely that relevant law will develop in other circuits. Because of the predominance of New York as "the nation's (and the world's) largest financial center" for investment, investment accounts that will be seized by foreign governments in the future are likely to be located only in the Second Circuit. *See Gen. Elec. Capital Corp. v. Cent. Bank*, 49 F.3d 280, 285 (7th Cir. 1995); *Banco Nacional de México v. Société Générale*, 820 N.Y.S.2d 588, 592 (N.Y. App. Div. 2006) (observing that the State of New York is "a clearinghouse of international transactions"). If left uncorrected, the Second Circuit's opinion will continue to govern the Nation's most crucial financial center, exposing massive amounts of assets in the United States to seizure by foreign governments,

while releasing those governments from accountability for their debt obligations here.

The attachability of nationalized assets is of paramount importance with respect to Argentina in particular. Argentina has a long and infamous history, going back two centuries, of defaulting on its sovereign debt. *See generally EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 466 n.2 (2d Cir. 2007). As the Second Circuit explained, "Argentina has made many contributions to the law of foreign insolvency through its numerous defaults on its sovereign obligations, as well as through what we might term a diplomacy of default." *Id.* Argentina's default in 1890 caused financial panic in England, and its threat to default again in 1956 was largely responsible for the creation of the so-called Paris Club. *Id.* Over the last three decades, Argentina has been a particularly recalcitrant debtor. In 1982, it suspended its foreign-debt payments and forced bondholders to accept reduced payments, becoming, as one commentator observed, "the single most resistant debtor in international finance." *Id.* (citing Ernest J. Oliveri, Latin American Debt and the Politics of International Finance 164 (1992)). In light of this history, there can be no doubt that this case presents a matter of vital national and international importance.

CONCLUSION

If the Court grants review, NML and EM will argue that the judgment of the Second Circuit should be reversed. If the Court subsequently grants the relief requested by Petitioners, it should also reverse the Second Circuit's decision with respect to NML and EM.

Respectfully submitted.

ROBERT A. COHEN
DENNIS H. HRANITZKY
DECHERT LLP
1095 Avenue of the
Americas
New York, NY 10036

DAVID W. RIVKIN
SUZANNE M. GROSSO
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
JASON J. MENDRO
DANIEL H. AHN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Respondents NML Capital, Ltd. and EM Ltd.

January 11, 2010